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No. 86-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DUNGEY,
Petitioner,

vs.

USX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a member of a bull gang repairing a crane, which will operate from a barge, a "seaman" for purposes of the Jones Act, where the assignment is temporary and most of the work is done on land?

2. If bull gang membership at the time of injury is insufficient for seaman status, is the bull gang member nonetheless a Jones Act seaman by virtue of his prior employment as a crane oiler on a ringer barge, where his only duties were to maintain the crane and he had no responsibility that related in any way to the navigability of the barge?

LIST OF PARTIES

The parties to the proceedings below were petitioner John Dungey and USX Corporation under its prior name, the United States Steel Corporation. The name change occurred on July 9, 1986. USX Corporation is respondent before this Court. The less than wholly-owned subsidiaries of USX Corporation are listed in the Appendix at A-1 and A-2.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent USX Corporation respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Appellate Court of Illinois, Fifth District, in this case. That opinion is reported at 148 Ill.App.3d 484, 499 N.E.2d 545 (1986).

STATEMENT OF THE CASE

Petitioner John Dungey in 1982 was a heavy equipment oiler and a member of Local 520 of the Operating Engineers. An "oiler" is responsible for the lubrication and fueling of construction machinery, including hoisting cranes. In late August of 1982, he was hired out of the union hall by respondent USX Corporation, then known as U.S. Steel Corporation, to work

on the construction of the Jefferson Barracks Bridge, which spans the Mississippi River south of St. Louis. Dungey was assigned to Ringer Barge #2, which consisted of a ringer crane supported by two barges welded together. A ringer crane is a hoisting crane mounted on a large horizontal ring. The ring permits the crane to turn 360 degrees.

When the crane was operational, Dungey's only duties — in practice and by contract — were to maintain the crane and assist its operator. (Tr. 584-85, 658-60). The crane was similar to those Dungey worked on when hired out to construction projects on land; his job responsibilities did not differ in any way from his usual land-based construction assignments. During the period the crane was operational, a tugboat would take Dungey and the rest of the work crew out to the crane each morning and bring them back each evening. In addition to the oiler, the work crew consisted of an ironworker foreman, the operating engineer who ran the crane, and five ironworkers. Upon arrival at the barge, the operating engineer and the oiler would attend the crane while the ironworkers, for the most part, worked upon the bridge structure.

The barge supporting the crane had no motive power of its own. It had no navigational equipment or lights. It was secured by anchor cables and spuds. When it had to be moved, it was pushed by tugboats. (Tr. 65-67). The barge did not transport any steel on the water. Supply barges brought steel out to the ringer barge and the ringer crane would lift the steel from the supply barge to the bridge superstructure. (Tr. 923-924, 1018-19).

On December 5, 1982, approximately three months after Dungey began work on Ringer Barge #2, the barge pulled loose of its moorings on the north side of the bridge and the crane collided with the bridge, severely damaging the boom. Consequently, the crane was inoperable and there was no need for Dungey's services as an oiler. (Tr. 122-23).

Dungey at that point could have gone back to the union hall and taken another oiler job. But he elected to hire out as an "operator" with a "bull gang" assembled to fix the crane. A bull gang employed to repair a crane consists of four ironworkers and four operators. Union rules permitted Dungey to join the bull gang as an operator at a rate of pay higher than his oiler pay. Some members of the bull gang had been members of the ringer barge work crew, others had not. (Tr. 583-84, 933-35, 939).

After December 5 the ringer barge was moved to shore for repairs by the bull gang. (Tr. 933). All repair work was done on shore until late December, when the barge was moved to a shallow part of the river north of the bridge for the attachment of the reconstructed boom to the crane. (Tr. 936, 941-42). On December 30, 1982, the bull gang boarded the barge to place the boom back on the crane. It was while cleaning the pin holes where the boom was to be connected to the crane — and as a member of the bull gang — that Dungey fell approximately six feet from the crane to the floor of the barge. Dungey applied for and received Illinois Workmen's Compensation benefits for his injuries.

REASONS FOR DENYING THE WRIT

Petitioner Dungey urges this Court to grant his petition for a writ of certiorari because the decision of the Illinois Appellate Court, Fifth District, "conflicts with decisions by this Court interpreting the application of the Jones Act and emphasizes conflicting standards in the United States Courts of Appeal." Petition for Writ of Certiorari ("Petition") at 11. In response, USX respectfully submits, first, that the decision below does not conflict with prior decisions of this Court. Second, the "conflict" which Dungey alleges among the courts of appeals is limited, and more one of emphasis than result. This Court has already denied certiorari in at least two prior cases urging the same purported conflict. Third, even if the Court thought the alleged conflict was now worthy of its attention, this case is not the appropriate vehicle to resolve any disagreement about the definition of a Jones Act seaman. It involves a unique factual context that may prevent the Court from reaching the question Dungey urges it to review. Indeed, resolution of the alleged conflict is unlikely to affect the result below.

I. There Is No Conflict With Prior Decisions Of This Court

The Illinois Appellate Court, Fifth District, held that on December 30, 1982 — the date of his injury — Dungey was not a "seaman" within the meaning of the Jones Act, 46 U.S.C. §688.

> It simply seems illogical that an essentially land-based worker, an oiler, a member of the operating engineers union, whose only duties were the oiling of the crane situated on the barge and subsequent repair of the boom of the crane after it was damaged, could be considered a seaman and member of the crew of a vessel. He performed no work in connection with the transportation function of the barge, which we here assume to be a vessel in navigation.

Appendix to Petition for Writ of Certiorari ("App.") at A-31 to A-32.

The appellate court carefully reviewed prior decisions of this Court. It noted the correspondence between a Jones Act "seaman" and a "member of a crew of any vessel" under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§901-950 (as amended). Congress placed the "master or member of a crew of any vessel" outside the LHWCA's compensatory scheme, *see* 33 U.S.C. §902(3)(G), precisely because such a "seaman" is protected by the Jones Act and general maritime law. This Court has treated the Jones Act "seaman" and the LHWCA's "member of a crew of any vessel" as synonymous, and therefore cases interpreting the latter phrase are relevant to Jones Act analysis. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); *see Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957).

This Court's leading case on the meaning of "seaman" or "member of a crew of any vessel" is *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940). *Bassett* held that a laborer whose work on a lighter consisted principally of facilitating the flow of coal onto steamboats was not a "member of a crew of any vessel." It held that "members of a crew of any vessel" are "those employees on the vessel who are naturally and primarily on board to aid in her navigation." *Id.* at 260. The Court concluded that

> the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted, and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as "in the position of longshoremen or other casual workers on the water."

Id. at 260, quoting *Scheffler v. Moran Towing & Transportation Co.*, 68 F.2d 11, 12 (2d Cir. 1933).

Bassett was followed some years later by *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957). At the time he was injured, Senko was employed as a handyman and responsible for maintaining a dredge. The jury had returned a verdict for Senko under the Jones Act and the Illinois Appellate Court, Fourth District, reversed, finding insufficient evidence that Senko was a "seaman."

This Court reinstated the jury verdict. It concluded that there was "sufficient evidence in the record for the jury to decide that petitioner was permanently attached to and employed by the dredge as a member of its crew."

> Petitioner's witnesses testified that he was known as a "deckhand" among rivermen. They said that he was hired to clean and take care of the deck, splice rope, stow supplies, and, in general, to keep the dredge "in shape." This testimony indicated that substantially all of petitioner's duties were performed on or for the dredge. A normal inference is that petitioner was responsible for its seaworthiness. If the dredge leaked, for example, the jury could suppose that his job would be to repair the leak. Furthermore, a witness testified that a usual duty of one holding petitioner's job was to take soundings and clean navigation lights when the dredge was in transit.

Id. at 372-73. The *Senko* Court concluded:

> Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that *he would have a significant navigational function when the dredge was put in transit,* we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew.

Id. at 374 (emphasis added).

Thus, as the Illinois Appellate Court noted below, *Senko* and *Bassett* both recognized that there must be a nexus between the duties of the individual and the "navigability" of the vessel, *i.e.*, it's ability to transport men and material across water. This is a broad standard, but not without limit. In his position as an oiler and later as a member of the bull gang, Dungey had no responsibility or duty that related in any way to the navigability of the barge. The result below is consistent with the teachings of *Bassett* and *Senko*.

Dungey argues that *Bassett* and *Senko* were undercut by three per curiam opinions in the late 1950's. In each case the Court held that there was an evidentiary basis for a jury finding of seaman status, and reversed the court of appeals' decision holding the plaintiff was not a seaman as a matter of law. Each majority opinion is delphic, with no discussion of the underlying facts. In at least two of the cases, however, there is some indication that the injured or deceased employee had some navigational function with respect to the vessel at issue. In *Texas Co. v. Gianfala,* 222 F.2d 382, 384 n. 2 (5th Cir.), *rev'd,* 350 U.S. 879 (1955), a case which Dungey characterizes as "directly controlling," Petition at 15, the decedent was responsible for pumping the barge out and floating it for movement to different job sites. Upon arrival at the new job site, he would then flood the barge to stabilize it at the new location. The decedent in *Harris v. Whiteman,* 243 F.2d 563, 564 (5th Cir. 1957), *rev'd sub nom. Butler v. Whiteman,* 356 U.S. 271 (1958), cleaned the engine room boilers.

In the third case decided per curiam by this Court, the district court opined that there was a factual question whether the plaintiff was a seaman, but concluded that he had an exclusive remedy under the Defense Bases Act and dismissed his Jones Act claim. The district court never decided the seaman issue or submitted it to the jury. A divided court of appeals held that

the plaintiff's action was not barred by the Defense Bases Act, but the panel majority then held as a matter of law that the plaintiff was not a seaman and affirmed on that basis. *Grimes v. Raymond Concrete Pile Co.*, 245 F.2d 437 (1st Cir. 1957), *rev'd*, 356 U.S. 252 (1958). The Supreme Court reversed and remanded to the district court, holding "that the petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel." *Id.* at 253. The facts related in the court of appeals' opinion and the Supreme Court dissent are too sketchy to permit any conclusions as to the petitioner's navigational role. The opinions refer to petitioner's work on a barge immediately before his injury, but do not describe the nature of that work.

There is nothing in *Gianfala, Butler,* and *Grimes* that undercuts the requirement that the Jones Act seaman have some navigational function.[1] The thrust of these three per curiam opinions was directed elsewhere. They were attempts to correct a perception in the lower courts that if the testimony was undisputed, the question of seaman status should be taken away from the jury and decided by the courts as a matter of law. The per curiam reversals emphasized that even if there is no credibility issue, "seaman" status is a mixed question of law and fact, like negligence, and committed to the jury's discretion, as long as their determination has some reasonable basis. As the *Senko* Court observed:

> Our holding [in *Bassett*] that the determination of whether an injured person was a "member of a crew" is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The

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[1] *See also Roper v. United States*, 368 U.S. 20, 24 n. 3 (1961) ("those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness"); *West v. United States*, 361 U.S. 118 (1959) (same).

> essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.

352 U.S. at 374.

There is no corresponding issue in this case as to the appropriate role of judge and jury. At Dungey's insistence, this case was tried to the court. In the federal system, appellate courts under the "clearly erroneous" standard have substantially more latitude to review factual findings of a trial court than those of a jury. *See, e.g., United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948). And certainly the standard of review of Illinois appellate courts is not an issue of concern, let alone a matter for review, in this Court. In sum, there is nothing in the appellate court's decision itself that is inconsistent with prior decisions of this Court or that would otherwise warrant review.[2]

II. The Ostensible Conflict Between The Fifth And Seventh Circuits Is Limited And Not Squarely Presented By The Facts Of This Case

As the appellate court noted below, *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), inspired a tripartite test for seaman status under the Jones Act: "(1) that the vessel be in navigation; (2) that plaintiff have a more or less permanent connection with the vessel; and (3) that plaintiff be aboard primarily to aid in navigation." App. A-11, citing *Carumbo v.*

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[2] The Petition implies that the appellate court's holding is somehow inconsistent with *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). Dungey suggests there is significance in the Court's observation that workers on floating platforms are "seamen" if "permanently attached to the vessel as crewmembers." *Id.* at 416-17 n. 2. Of course, the *Herb's Welding* quotation begs the question in this case: Was Dungey permanently attached to the ringer barge as a crewmember? Consequently this dicta in *Herb's Welding* does not advance Dungey's analysis.

Cape Code S.S.Co., 123 F.2d 991 (1st Cir. 1941). These early cases recognized that "navigation is not limited to 'putting over the helm.' " *Norton v. Warner Co.*, 321 U.S. 565, 572 (1944). "[O]ne is aiding in navigation even though he happens to be a cook or an engineer." *Carumbo*, 123 F.2d at 995. But there must be some substantial nexus with the movement of the vessel. It was the absence of such a nexus that prompted the appellate court to hold that Dungey was not a Jones Act seaman.

Dungey in the circuit and appellate courts relied on *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). In *Robison* the Fifth Circuit attempted to divine the significance of the per curiam opinions of *Gianfala, Butler* and *Grimes* in a case involving a roughneck on a mobile drilling platform. The Fifth Circuit concluded that the effect of these cases was to water down the "aboard primarily to aid in navigation" requirement to a test that conferred seaman status on an individual

> if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Id. at 779.

Dungey contends, and the appellate court acknowledged, this standard is more liberal than that adopted by the Seventh Circuit in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). *Johnson* criticized the *Robison* standard as "too broad in that it accords insufficient weight to the relationship between the employee and the *transportation function* of the vessel." *Id.* at 1061 (emphasis in original). It faulted the Fifth Circuit for attempting to read too much into *Gianfala, Grimes* and *Butler*, and ignoring the *Senko* Court's emphasis on the employee's

navigational tasks. The Seventh Circuit concluded "it is the employee's relation to the transportation function of the vessel, *i.e.*, whether the employee contributes to the maintenance, operation, or navigation of the vessel as a means of transport on water, that is critical for Jones Act purposes." *Id.* The court held that an ironworker, assigned to and injured on a crane barge, was not a seaman. Although he may have occasionally thrown or fastened mooring lines, he did not make "a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." *Id.* at 1063.

Dungey argues the *Johnson* standard conflicts with that of the Fifth Circuit in *Robison,* and this conflict warrants granting his petition. Even if this case presented the Court with an appropriate vehicle for resolving this purported conflict, it would still not be worthy of certiorari. First, the alleged conflict is limited. No circuits outside the Fifth and Seventh have had occasion to apply the *Robison* standard in light of *Johnson.* To the extent circuits outside the Fifth have attempted to identify seamen under the Jones Act, they appear to adhere, consistent with the Seventh Circuit, to the "in aid of navigation" requirement of *Senko* and *Bassett. Robison,* at least as Dungey interprets it, is not the "majority approach." Petition at 13.[3]

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[3] *See, e.g., Salgado v. M.J. Rudolph Corp.,* 514 F.2d 750, 755 (2d Cir. 1975); *Simko v. C&C Marine Maintenance Co.,* 594 F.2d 960, 964-65 (3d Cir.), *cert. denied,* 444 U.S. 833 (1979); *Caldwell v. Ogden Sea Transport, Inc.,* 618 F.2d 1037, 1050 (4th Cir. 1980); *Searcy v. E. T. Slider, Inc.,* 679 F.2d 614, 616 (6th Cir. 1982); *Craig v. M/V Peacock on Complaint of Edwards,* 760 F.2d 953, 956-57 (9th Cir. 1985).

In *Presley v. Healy Tibbits Construction Co.,* 646 F.Supp. 203 (D.Md. 1986), for example, the district court considered the Jones Act status of a pile driver who was hired out of the Pile Drivers' Union to clear trenches in Baltimore harbor. He was assigned to a crane barge, but unlike Dungey, the employee did have some incidental assignments related to the movement of the barge. The district court held the employee was not a seaman because his duties did not serve

Second, there is some question how different the *Johnson* and *Robison* standards are in practice. Even in *Robison* the Fifth Circuit cited Robison's importance to the navigability of the platform. As the appellate court observed below:

> *Robison* may be distinguished from the instant case in that Robison's duties aboard the drilling platform, capable of floating as a vessel, unlike Dungey's duties here, "contributed to her mission, to the operating function she was designed to perform as a sea-going drilling platform. Some of Robison's duties had a 'significant navigational function,' like Senko's [*Senko v. LaCrosse Dredging Corp.* (1957), 352 U.S. 370, 77 S.Ct. 415, 1 L.E.2d 404] in that they related to the seaworthiness, maintenance (welfare) of Offshore No. 55. Some of his duties . . . are traditional [*sic*] duties of seamen in that they related to the movement of the vessel as a means of transport on water."

App. at A-16 to A-17, quoting *Offshore Corp. v. Robison*, 266 F.2d at 779. At least one lower court expressly applying *Robison* has required crane operators on floating platforms to prove something more than operation and maintenance of the crane to establish seaman status. *McSweeney v. M. J. Rudolph Corp.*, 575 F.Supp. 746 (E.D.N.Y. 1983). *See also Wallace v. Oceaneering International*, 727 F.2d 427, 436 (5th Cir. 1984) (commercial diver is seaman because diver "embodies the traditional and inevitably maritime task of navigation").

The current conflict between the Fifth and Seventh Circuits appears to be more one of dicta and emphasis than inconsonant holdings in factually similar case . While abjuring a strict "in

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naturally and primarily as an aid to navigation. "He was on board as a pile driver and only incidentally did he assist in the movement of the barge from one location to another. Furthermore, the pile driving work which he was performing was not itself in aid of navigation. Rather, it was directed toward maintaining landbased utility lines." *Id.* at 205-06.

aid of navigation" requirement in cases such as *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 383 (5th Cir. 1985), the Fifth Circuit has in fact tightened other aspects of *Robison's* test for seaman status. *See, e.g., Waguespack v. Aetna Life & Casualty Co.*, 795 F.2d 523 (5th Cir. 1986) ("work barges" not within Jones Act definition of vessel), *cert. denied,* 107 S.Ct. 1309 (1987); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1076 (5th Cir. 1986) (en banc) (Barrett not seaman because he "did not perform a substantial portion of his work aboard a vessel or fleet of vessels"); *Prinzi v. Keydril Co.*, 738 F.2d 707, 710 (5th Cir. 1984) (member of drilling crew not "seaman" because his "work concerned not the barges that the drilling rig rested upon, but the rig itself"). It may be because the purported conflict is one more of rhetoric than results that this Court has already denied petitions for certiorari in two cases that directly raised the *Johnson-Robison* conflict, including *Johnson* itself. *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237 (5th Cir. 1986), *cert. denied,* 107 S.Ct. 939 (1987); *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert denied,* 469 U.S. 1211 (1985).[4] The ostensible conflict is no more pronounced now — arguably less so given cases such as *Waguespack, Barrett,* and *Prinzi.* It is certainly no more worthy of this Court's attention.

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[4] These are only two of at least eight occasions since the 1980 Term in which the Court has declined invitations to review the defintion of a seaman under the Jones Act. *See also Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied,* 464 U.S. 1069 (1984); *Berry v. American Commercial Barge Lines,* 114 Ill.App.3d 354, 450 N.E.2d 436 (1983), *cert. denied,* 465 U.S. 1029 (1984); *Reed v. Diamond M Drilling,* 712 F.2d 1414 (5th Cir. 1983), *cert. denied,* 464 U.S. 1043 (1984); *Mellon v. John F. Beasley Construction Co.*, 661 F.2d 924 (4th Cir.), *cert. denied,* 454 U.S. 1033 (1981); *Crador v. Louisiana Dept. of Highways,* 625 F.2d 1227 (5th Cir. 1980), *cert. denied,* 452 U.S. 915 (1981); *Bazile v. Bisso Marine Co.*, 606 F.2d 101 (5th Cir. 1979), *cert. denied,* 449 U.S. 829 (1980).

III. This Case Does Not Properly Present The Issue Of The Jones Act Status Of Construction Workers Operating Or Maintaining Construction Machinery On Floating Platforms

Dungey's petition is vague about the question he is asking this Court to consider. His "question presented" does not incorporate any specific facts of this case. The implication in his references to *Gianfala, Grimes* and *Herb's Welding* is that the only issue is whether a crane oiler on a floating construction platform is a seaman under the Jones Act. But the factual context of this case is more complicated, because Dungey was not working as an oiler at the time he was injured. He was part of a bull gang assembled specifically for the purpose of repairing the crane. He was not required to join the bull gang as a result of his prior employment as an oiler on the ringer barge. Indeed there were no oiler jobs on the bull gang. Dungey was hired onto the bull gang as an operator at a rate of pay *higher* than his hourly rate as an oiler.

The appellate court did not consider the significance of Dungey's involvement with the bull gang because it found that even as a crane oiler, Dungey was not a seaman. But this Court is not limited to the grounds relied on by the appellate court. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977); *Dandridge v. Williams,* 397 U.S. 471, 475 (1970); *Langnes v. Green,* 282 U.S. 531, 538-39 (1931). If certiorari is granted, the unique facts of this case may mean that the Court will not reach the questions of the vitality of the "in aid of navigation" requirement and the seaman status of construction workers on floating platforms. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959). It may simply conclude that at the time of his injury, Dungey was a ship repairer, analogous to a harbor worker or longshoreman, and within the terms of the LHWCA — not the Jones Act.

In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), this Court, in an opinion by Justice Jackson, held that seaman

status under the Jones Act depends upon "the activity in which [the employee] was engaged *at the time of injury.*" *Id.* at 190 (emphasis added). In *Desper* the decedent was employed by the defendant during the summer months as a motorboat operator on the Illinois River. During the winter, his duties consisted of maintaining and repairing the defendant's motorboats for the upcoming season. The employee was killed when a fire extinguisher exploded on a moored barge where he was painting life preservers for use on the boats. The Court concluded:

> To be sure, [the decedent] was a probable navigator in the near future, but the law does not cover probable or expectant seamen but seamen in being. It is our conclusion that while engaged in such seasonal repair work Desper was not a "seaman" within the purview of the Jones Act.

Id. at 190-91.

When Dungey was injured, he was a member of an ad hoc repair crew. There was a distinct break in Dungey's employment as an oiler. He got a new job: different responsibilities with a new crew at a higher wage rate. Most of the bull gang's work was done on land. Lower courts, including the Fifth Circuit, have concluded that employees who repair vessels are not usually Jones Act seamen. In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), the Fifth Circuit held that an electrician, whose contacts with vessels were limited to performing vessel repairs, was not a seaman within the meaning of the Jones Act. The court noted that a ship repairer is expressly covered by the LHWCA as a result of the 1972 amendments to that Act. Therefore, he cannot be a Jones Act seaman, even if he spent a substantial portion of his time aboard a recognized fleet of vessels performing electrical repairs.

Dungey's repair work was even farther removed from the traditional work of a seaman, because the bull gang repaired the crane, not the barge that was supporting it. "[A] sensible and practical distinction can be and is drawn between repairs that

can be and are likely to be made by seamen during the course of a voyage and repairs the nature and extent of which make them beyond the area of a seaman's normal responsibility." *Bryant v. National Transport Corp.*, 467 F.2d 139, 140 (3d Cir. 1972), citing *Desper, supra. See also Berry v. American Commercial Barge Lines*, 114 Ill.App.3d 354, 450 N.E.2d 436, 442 (1983) ("[t]he proper rule . . . is that whether a plaintiff acted 'primarily in aid of navigation' at the time of his injury is a jury question if the plaintiff was a repair or maintenance worker who was directly connected with keeping a vessel in navigation or preparing it to retain navigational capacity"), *cert. denied*, 465 U.S. 1029 (1984).

In addition to the work the employee was doing at the time he was injured, some lower courts, including the Fifth Circuit, have suggested that the type of work he did before and after his injury is relevant to, but not determinative of, his seaman status. Other factors include the duration of the new assignment, its relationship to the employer's business, "whether the employee was free to accept or reject it without endangering his employment status and any other factors relevant to the ultimate inquiry." *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 453 (5th Cir. 1980). It is certainly not clear that the Fifth Circuit in weighing these factors — or any other court of appeals — would find the determination Dungey was not a Jones Act seaman "clearly erroneous" under the peculiar facts of this case.

CONCLUSION

The decision of the Illinois Appellate Court for the Fifth District comports with prior decisions of this Court. Although Petitioner argues that the holding below "emphasizes conflicting standards in the United States Court of Appeals," it is not at all clear that any court of appeals confronted with the same facts would have reached a different conclusion about Petitioner's seaman status. In any event, this case does not squarely present the conflict Petitioner urges the Court to resolve, and resolution of that conflict is unlikely to change the result below. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

The less than wholly-owned subsidiaries of USX Corporation are:

Athlone Prospecting & Development Corporation, Ltd.
First National Bank (Albion, PA)
Alfa Produtos Metalurgicos, Ltda.
ITW Mapri (51% owned by Alfa Products)
Companhia Siderurgica Paulista "Cosipa"
Merinds Mineracao (Partnership)
Mineracao Buritirama Ltda.
Mineracao Cárajas, Ltda. (Partnership)
Mineracao Maraba, Ltda. (Partnership)
Mineracao Xingu, Ltda. (Partnership)
Termerid Mineracao, SA
Torremco Soc. Min. E Com. Ltda. (Partner)
DeepSea Ventures, Inc.
Ocean Mining Associates - Joint Venture
Industria de Tubos y Perfiles, S. A. (Intupersa)
USS-POSCO Industries - Partnership
Sidbec-Normines, Inc.
U. S. Steel France
Compagnie Miniere de l'Ogooue (Comilog)
Feralloys, Ltd.
Zeerust Chrome Mines, Limited
USS Technology (Japan) Ltd.
ACE Holdings, Ltd.
Coda Holding, Ltd. (CODA-H)
Corporate Officers & Directors
Assurance, Ltd. (CODA)
Adela Investment Company, S.A.
Altos Hornos de Vizcaya, S. A. (AHV)
Associated Manganese Mines of South Africa, Ltd.
Associated Ore & Metal Corporation, Ltd.
Avsteel SWA, Ltd.
Blue Grass Phosphate Company

Chrome Deposit Corp. (Court Holdings J. V.)
Kappa Mining & Prospecting Co., Ltd.
La Pointe Iron Company
Navios Shipping Corp.
Oresteel Investments (Proprietary), Ltd.
Prieska Copper Mines (Pty.) Ltd.
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societe Des Mines De Fer De Guinee Pour L'Exploitation Des Monts Nimba (Mifergui Nimba)
Terninoss Acciai Inossidabili - S.p.A.
Tilden Iron Mining Company
West Union Canal Company, The
Zuari Agro Chemicals Ltd.
Bartow Chemical Products
Century III Associates
Fort Meade Chemical Products
Double Eagle Steel Coating Co. - Joint Venture
Live Oak Uranium Operations
Rockland Joint Venture (Cost-Sharing)
RMI Company
Tenn-USS Chemicals Co. - Joint Venture
Worthington Specialty Processing
Arctic LNG Transportation Company
Badger Pipe Line Company
City Point Oil Terminal, Inc.
CLAM Petroleum Company
Cook Inlet Pipe Line Company
Deutsche Transalpine Olleitung GmbH
Explorer Pipeline Company
Gravcap, Inc.
Green Bay Terminal Corporation
Kenai LNG Corporation
LOCAP, Inc.
LOOP Inc.
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited

Petroleum Terminals, Inc.
Pilot Oil Corporation
Platte Pipe Line Company
Polar LNG Shipping Corporation
Russell Stewart Oil Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
West Shore Pipe Line Company
Wolverine Pipe Line Company
Acadian Gas Pipeline System
Bayou Interstate Pipeline System
Calcasieu Gas Gathering System
Louisiana Industrial Gas Supply System
Neches Pipeline System
Pelican Interstate Gas System
Pelican Transmission System
Pontchartrain Natural Gas System
Spindletop Gas Distribution System
Alabama Intrastate Supply
Red River Pipeline Corporation
Ozark Finance Corporation